No. 93-121

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WHITE PLAINS TOWING CORP.,
d/b/a DON'S TOWING and DONALD CHERICO,

Petitioners,

—against—

HAROLD J. WRIGHT and E.P. STREIDER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Introduction

Respondents Harold J. Wright and E.P. Streider ("respondents") respectfully submit this brief in opposition to the petition for certiorari. The petition should be denied because it does not present a conflict among the courts of appeals and does not raise an important federal question which should be settled by this Court.

Statement Of The Case

Troop K of the New York State Police is responsible for, *inter alia*, securing the safety of the public on Interstate Route I-287 in Westchester County, New York. In 1985, when the petitioners' claims arose, both respondents were police officers stationed at Troop K.

For the purpose of assisting motorists with disabled vehicles, Troop K divided Route I-287 into three zones, and assigned one of three towing companies to each zone to provide this service. Under the arrangement, Troop K would dispatch the designated towing company to a disabled vehicle, unless the motorist requested otherwise. As stipulated at trial, this arrangement was not authorized or codified by any statute or regulation of the State Police, was not contractual in nature, and was not awarded on the basis of any bid, license, or permit. (A. 23-24).

In 1984, Troop K assigned one of the three zones on I-287 to petitioners for a two-day period. Some time later in 1984 petitioners were again assigned a zone on I-287, which it serviced for the next 9 to 12 months. During this period, petitioner Cherico orally and in writing made repeated demands for a larger share of towing assignments. In addition, on or about April 19, 1985, Cherico lodged a complaint with the State Police against the respondents, alleging that they had impugned his reputation by stating that he was a "'thief', 'no good', and associated with organized crime." (A. 4). The complaint was withdrawn days after it was lodged. (A. 22).

Some three months later, in a letter dated July 26, 1985, respondent Wright informed petitioner Cherico that the I-287 towing assignment would be terminated on July 31, 1985, and that petitioners would not be summoned for a towing job unless they were specifically requested by a motorist. No reason for the termination was given in the letter.

Wright informed his supervisor of the termination and enclosed a memorandum prepared by Streider. The memorandum set forth various incidents involving Cherico: a complaint from an insurance company that Cherico billed $15,500 for tow work on a trailer and refused to release its cargo to force payment; a complaint by a motorist that while petitioners advertised $5 a day storage, they charged $10; the fact that Cherico made and then withdrew an unfounded complaint that respondents had stated Cherico was connected to organized crime; an admission by a third person that, at Cherico's request, he had filed an unfounded complaint against one of Cherico's competitors; and information suggesting that Cherico or his son may have been responsible for placing an abandoned vehicle with no license plates on a section of I-287 which was assigned to another towing company. (A. 5).

Streider's memorandum concluded by noting that Cherico was a source of annoyance and embarrassment to the State Police, that his constant complaints about insufficient towing jobs caused the police needless wasted time on investigations, interviews, and preparing and reading reports, that Cherico did not have the proper licenses to operate some of his equipment, and that it was not in the best interest of the State Police to have a person of "Mr.Cherico's ilk providing services to the users of an interstate highway patrolled solely by the State Police." (A. 6).

District Court Proceedings

Petitioners thereafter filed complaints with the State Police and the Office of the Governor. When these complaints were unsuccessful, petitioners commenced this action under 42 U.S.C. § 1983. They alleged, *inter alia*, that the I-287 towing assignment was terminated because Cherico exercised his right of free speech in complaining to the State Police about the respondents and that his due process and equal protection rights were violated when derogatory comments were made by

respondents about him, to his detriment, at about the time the towing arrangement was terminated.[1]

After a one-day bench trial, the district court (Brieant, C.J.) dismissed petitioners' equal protection claims, but found Wright and Streider liable for violations of petitioners' rights under the First Amendment and Due Process Clause. The district court rejected respondents' defense of qualified immunity on the due process issue. Because the district court found that there was insufficient evidence to support actual damages, petitioners were awarded nominal damages of $1.00.

Decision Of The Court Of Appeals

On appeal, the court of appeals reversed the judgment in petitioners' favor, dismissed the cross-appeal as moot and directed that judgment be entered dismissing the complaint. (A. 28).

The court held that there was no violation of petitioners' First Amendment Rights, stating that the "vast majority" of Cherico's "speech" involved "demands and complaints" about getting more towing business, comments which did not concern matters of public interest, but rather private commercial interest. (A. 18). While acknowledging that Cherico's complaint against the respondents regarding their conduct as public officers was a matter of public concern and could properly have been found as the substantial motivating factor for the termination, the court concluded that, based upon the record before it and the factual findings of the district court, "[respondents] would indeed have terminated Cherico's towing referrals even in the absence of his short-lived personnel complaint." (A. 20).

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[1] The trial court (Broderick, J.) originally dismissed petitioners' due process and equal protection claims, the latter without prejudice. The final amended pleading included only First Amendment and equal protection claims. The case was reassigned to a new judge who, after trial, dismissed the equal protection claim but found respondents guilty of First Amendment and due process violations. He vacated the earlier order which had dismissed the due process claim with prejudice. (A. 8, A.12).

The court also rejected petitioners' due process claims. The court first found that petitioners had no cognizable property interest in continued towing referrals on I-287, and the termination of their status thus did not implicate due process. (A. 24). Additionally, the court noted that respondents' conduct after the termination, which the district court relied on, was an insufficient basis to find a due process violation because injury to reputation alone does not deprive an individual of a liberty or property interest protected by due process. Rather, "some 'stigma plus' is required." (A. 24).

To establish a "stigma plus" due process claim where no property interest is involved, a party must establish not merely that derogatory charges were made in connection with a termination without a hearing but that the charges were disseminated or "published". In this case, the court found that there was no evidence that respondents made the critical statements to the public in general, to any member of the public in particular or to any person inquiring as to petitioners' towing operations. The statements were only made to other police officers who were not decisionmakers as to towing assignments. The court stated it "doubted" that police officers informing other police officers that an individual has been accused of dishonesty or is believed to have ties to organized crime constitutes sufficient publication to satisfy the "stigma plus" requirement, but held that it need not decide whether such a communication constitutes sufficient publication, because "it is quite clear that respondents are entitled to qualified immunity with respect to this claim". (A. 25-26).

The court held that the respondents were immune from liability because the law was not clearly established on two issues: (1) whether the towing assignment provided petitioners with a status sufficient to give them a due process protected liberty interest in avoiding termination without a name-clearing hearing, and even if the answer was yes, (2) whether the communication by one police officer to another police officer of a charge that a given individual has performed dishonestly

or of his belief that the individual has ties to organized crime can constitute a publication sufficient to violate the individual's liberty interest. (A. 27). Accordingly, the court held that respondents were entitled to qualified immunity, noting it "would be surprised to find" a court which held that on these facts petitioners had demonstrated a due process violation. (A. 27).

REASONS FOR DENYING THE WRIT

A. The Second Circuit Correctly Held That Petitioners' First Amendment Rights Were Not Violated.

The court of appeals' decision that termination of petitioners' motor vehicle towing status with the State Police did not violate the First Amendment is in accord with decisions of this Court. An employee who allegedly has been discharged by the government because he exercised his right of free speech under the First Amendment must establish (a) that he spoke "as a citizen on a matter of public concern," and (b) that his speech was at least a "substantial" or "motivating factor" in his discharge. (A. 16). *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Connick v. Myers*, 461 U.S. 138 (1983); *Ezekwo v. New York City Health & Hospitals Corp.*, 940 F.2d 775 (2d Cir.), *cert. denied*, 112 S.Ct. 657 (1991). Even if an employee establishes these two elements, a public employer will not be liable if it is established that (a) it would have terminated the employment in the absence of the employee's exercise of free speech, or (b) there was a tipping of the scale in its favor on a balance between the employee's right of free speech "against the extent to which the employee's conduct interfered with the functioning of the workplace . . ." (A. 17). In this balancing, speech which involves a matter of public concern is entitled to little weight if it is raised solely to advance the employee's employment interests. *See, e.g., Connick*, 461 U.S. at 154. (A. 17).

In applying these principles to this case, there can be no dispute that petitioners' termination was lawful. First, petitioners'

speech—the filing of a personnel complaint against respondents—did not raise a matter of public concern. Second, the personnel complaint played only a "slight" role in the termination. Finally, as the court of appeals found, the trial court's findings, "amply supported by the evidence, compel the conclusion that [respondents] would indeed have terminated [petitioners'] towing referrals even in the absence of his short-lived personnel complaint." (A. 20). For example, it is undisputed that the decision to terminate petitioners' assignment was due in part to Cherico's repeated demands for more assignments. Thus, the court of appeals correctly held that petitioners failed to meet the test set forth by this Court for establishing a First Amendment violation.

Petitioners contend, however, (Pet. at 8-10) that the court of appeals erred in not remanding the case to the trial court on this issue, rather than reversing and granting judgment to the respondents. The granting of judgment for the respondents was warranted by the court of appeals's proper application of the law to the facts of this case and that decision does not merit further review.

B. The Second Circuit Correctly Dismissed The Due Process Claim On The Grounds Of Qualified Immunity.

In rejecting petitioners' due process claim, that state action deprived him of a protected property interest, the court of appeals simply applied well-established principles, citing *Matthews v. Eldridge*, 424 U.S. 319 (1976). An interest which the state can terminate "at the whim of another person" is not a property right protected by due process. *Bishop v. Wood*, 426 U.S. 341 (1976); *Goetz v. Windsor Central School District*, 698 F.2d 606 (2d Cir. 1983). Here, it is uncontested that petitioners' towing arrangement with the State was informal and terminable at will and, therefore, not a protected property interest entitled to due process protection. (A. 24).

While the court of appeals recognized that a due process liberty interest may be implicated where the termination does not involve a property right but involves derogatory charges in connection with the state action, creating a "stigma plus" which could damage petitioners' standing and associations and affect future employment opportunities, it held that proof in such cases of sufficient "publication" of the state's charges was essential to meet the stigma plus test, citing *Bishop*. However, the court stated that it "doubted" whether the memorandum by Streider to his supervisor in the State Police that petitioners were dishonest or believed to be associated with organized crime, constituted sufficient publication to satisfy the "stigma plus" requirement. Regardless of these questions, the court held that it need not decide the issue of publication because "it is quite clear that respondents are entitled to qualified immunity" on this claim. (A. 26).

Relying on *Anderson v. Creighton*, 483 U.S. 635 (1987), and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the court held that respondents were entitled to qualified immunity because the law was not clearly established on the question of whether the termination of the towing assignment required a name-clearing hearing and if it did, whether an inter-police department memorandum from one officer to another including a charge that a third person is dishonest and has connections to organized crime constitutes sufficient "publication" to meet the stigma plus test.

Even were this Court to address the publication issue now or in the future, respondents would still be entitled to qualified immunity because the law was unsettled in 1985 at the time of respondents' actions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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